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Nos. 87-981 and 87-1028
Consolidated

In The
Supreme Court of the United States
October Term, 1987

BEECH AIRCRAFT CORPORATION AND
BEECH AEROSPACE SERVICES, INC.,
Petitioners,

vs.

JOHN C. RAINEY,
Respondent,

BEECH AIRCRAFT CORPORATION AND
BEECH AEROSPACE SERVICES, INC.,
Petitioners,

vs.

RONDI M. KNOWLTON,
Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals For The Eleventh Circuit**

BRIEF OF PETITIONER BEECH AIRCRAFT CORPORATION (CASE NO. 87-981)

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QUESTIONS PRESENTED

I. Whether evaluative conclusions contained in a trustworthy public report of an investigation conducted pursuant to law, are admissible pursuant to Federal Rule of Evidence 803(8)(C)?

II. Whether the Eleventh Circuit misconstrued Fed.R. Evid. 106 and 801 (d)(1)(B) in holding that the trial court abused its discretion by refusing to admit an unqualified hearsay opinion?

PARTIES TO PROCEEDINGS BELOW

1. John C. Rainey
2. Rondi M. Knowlton
3. Beech Aircraft Corporation
4. Beech Aerospace Services, Inc.
5. Pratt & Whitney Canada, Inc.[1]
6. Raytheon Company is the parent corporation of Beech Aircraft Corporation
7. Beech Aircraft Corporation is the parent corporation of Beech Aerospace Services, Inc.
8. United Technologies Corporation is the parent corportation of Pratt & Whitney Canada, Inc.
9. Underwriters at Lloyds of London and certain British companies; La Reunion Aeroienne; Aviation Office of America; and Skandia Insurance Company, Ltd., are the insurers of Beech Aircraft Corporation and Beech Aerospace Services, Inc.

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[1] The undersigned counsel are advised that Respondents Rainey and Knowlton have settled with the Petitioner Pratt and Whitney Canada, Ltd., and that a stipulation or other request has been submitted to the Court for dismissal of Case No. 87-1146.

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OPINIONS BELOW

1. The Original Panel Opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 784 F.2d 1523 (11th Cir. 1986) (Johnson, J., concurring specially) (J.A. 119).

2. The Opinion of the United States Court of Appeals for the Eleventh Circuit granting rehearing *en banc* and vacating the prior panel opinion is reported at 791 F.2d 833 (11th Cir. 1986) (J.A. 134).

3. The *en banc* opinion of the United States Court of Appeals for the Eleventh Circuit Court is reported at 827 F.2d 1498 (11th Cir. 1987) (Tjoflat, J., concurring) (J.A. 136).

4. The final judgments entered after a jury verdict in the United States District Court for the Northern District of Florida (Pensacola Division) were not reported (J.A. 101 and 103).

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STATEMENT OF JURISDICTION

This Court has certiorari jurisdiction pursuant to 28 U.S.C. 1254(1) (1982). The *en banc opinion* of the Eleventh Circuit was issued September 22, 1987. No petition for rehearing was filed. Beech Aircraft Corporation's Petition for Certiorari was filed December 15, 1987. The Petition was granted on February 29, 1988, and consolidated with Case No.'s 87-1028 and 87-1146.

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FEDERAL RULES OF EVIDENCE AT ISSUE

Federal Rule of Evidence 803. Hearsay Exceptions: Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as witness:

(8) Public records and reports. Records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Federal Rule of Evidence 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Federal Rule of Evidence 801(d)(1)(B) Statements which are not Hearsay

Statements which Are Not Hearsay. A statement is not hearsay if—

(1) Prior Statement by Witness. The declarant testifes at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . (B) consistent with his testimony and is offered to rebut an express or implied charge against

him of recent fabrication or improper influence or motive.

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STATEMENT OF THE CASE

These cases grow out of the crash of a trainer aircraft which claimed the lives of two naval aviators. The pilots' respective spouses, John C. Rainey and Rondi M. Knowlton brought separate suits in the United States District Court for the Northern District of Florida against Defendants, Beech Aircraft Corporation ("Beech"), Beech Aerospace Services, Inc. ("BASI") and Pratt & Whitney Canada, Ltd. ("Pratt & Whitney"). Plaintiffs sought damages pursuant to Florida's Wrongful Death Act, Fla. Stat. § 768.16-27 (1985). (J.A. 17-23, R. 13-21). Plaintiffs alleged that the T-34C Aircraft flown by LCDR Barbara Ann Rainey and Ensign Donald Bruce Knowlton was equipped with a defective pneumatic fuel control system which caused the plane to experience "power interruptions." (J.A. 17-23, R. 13-21). Following a two-week bifurcated trial, the jury returned a verdict in favor of the Defendants. (J.A. 98-100, R. 1500).[2]

The Jag Report

On July 13, 1982, flight instructor LCDR Barbara Ann Rainey and her student, Ensign Donald Bruce Knowl-

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[2] The following designations are used in this brief: "R" for the record on appeal; "J.A." for the joint appendix; the trial transcript is cited by volume followed by a colon and the page number, e.g., "V.5: 54"; Respondents will be referred to as Plaintiffs, Respondents or by their individual names where appropriate.

ton, were on a FAM training exercise at Middleton Field, Alabama. (J.A. 17-23). The accident occurred while the pilots were practicing "touch and go" landings with five other trainer aircraft.

On July 14, 1982, Lieutenant Colonel David I. Habermacher, USMC, the commanding officer of LCDR Rainey's training squadron, ordered LCDR William C. Morgan to conduct an investigation into the circumstances surrounding the air crash. This investigation was authorized by the Manual of the Judge Advocate General Chapter VI § 0902 at 9-3 to 9-5. (J.A. 3). On September 1, 1982, LCDR Morgan delivered a comprehensive investigative report to the commanding officer of the Squadron. (J.A. 3-16). Commander Morgan's investigative report consisted of a preliminary statement, findings of fact, opinions and recommendations. (J.A. 3-16). Accompanying his report were sixty (60) enclosures consisting of one hundred fifty-nine (159) pages. These enclosures included, among other things, the pilots' naval flight and medical records; the maintenance records on BUNO 160955; statements from other instructor pilots and students involved in the training exercise at the time and place of the crash; statements from on scene rescue personnel; aerial photographs of the crash scene; casualty reports on both pilots; an engineering investigation report of the subject aircraft engine; photographs of the aircraft wreckage; statements of the pilots' spouses; a diagram of the aircraft traffic pattern; a diagram of the accident site; and other relevant documents.

As part of his investigation, LCDR Morgan prepared a seven page report containing his findings. (J.A. 2-16).

This report was later endorsed by ten of Morgan's superior officers, including the Chief of Naval Operations. Some of these officers challenged various findings by Morgan, none, however, took exception with any of the evaluative conclusions contained in his report.

In its March 20, 1984 Pretrial Order, the trial court ruled that LCDR Morgan's report was a trustworthy public record. (J.A. 35). The Court at that time, however, limited the admissibility of the report to the factual findings contained therein. (J.A. 35).

In the ensuing months before trial, the Defendants continued to urge that, as a trustworthy public record, Commander Morgan's Jag report should be admitted in its entirety. At a June 6, 1984 hearing on pending motions the Defendants again argued in favor of broad admissibility of Commander Morgan's findings. Shortly thereafter, with leave, both Beech and BASI submitted separate letters and legal memoranda urging the trial court to admit the entire Jag report. (R.1293-1304, 1328-1331, 1440).

At a conference on July 10, 1984, the trial court announced that, after reviewing the authorities and having further discussion with counsel, it would allow as evidence certain evaluative findings contained in the Jag report. (J.A. 40). The court thereupon excised certain portions of Morgan's findings and indicated to counsel that the following evaluative conclusions from the Jag report would be received. (J.A. 40-42):

> 1. Examination of the findings of fact, aircraft history and inspection records indicate no irregularities which can be specified as a cause of the crash of 3E955.

2. There is no factual evidence of command or supervisory error.

3. There is no factual evidence to indicate that LCDR Rainey or ENS Knowlton were not physically, sociologically, or mentally prepared to complete their flight.

4. There is evidence to indicate that the failure to ENS Knowlton's rotary buckle may have contributed to the severity of his head injury.

5. Because both pilots were killed in the crash and because of the nearly total destruction of the aircraft by fire, it is almost impossible to determine exactly what happened to Navy 3E955 from the time it left the runway on its last touch and go until it impacted the ground.

7. The most probable cause of the accident was the pilots failure to maintain proper interval.

(J.A. 97). At the time of this ruling the Court granted Plaintiff's request to present evidence on the trustworthiness of the report. (J.A. 42). Defendants agreed, and offered no objection to the calling of previously unlisted witnesses for this purpose. (J.A. 42). Notwithstanding this invitation the Plaintiffs did not call any witnesses, nor did they present any evidence on the trustworthiness of the Jag report.

Cross-Examination of LCDR Rainey[3]

Plaintiff, John C. Rainey, was called by the defense as an adverse party witness. (J.A. 53; V.5: 60). During direct examination Rainey was questioned about certain

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[3] Both the plaintiff John C. Rainey, and Barbara Ann Rainey were Lieutenant Commanders in the United States Navy.

admissions contained in an unsolicited post-accident letter which he had written to the investigating Jag officer, LCDR Morgan. These written admissions concerned statements Rainey had made regarding unnecessary pressures on the pilots to complete the flight and the final maneuvers of the downed aircraft. During direct by the defense, Rainey was not asked his opinion as to the proximate cause of this air crash. (J.A. 53-75; V.5: 60-82).

On cross by his counsel, Rainey testified that he had not attempted to influence the testimony of any witnesses. (J.A. 76). He also testified that he had flown the final flight path maneuvers of his wife's aircraft and that it was his experience that the plane would not stall with full power available. (J.A. 76-77). The trial court, however, sustained an objection and refused to allow Plaintiff's counsel to ask Rainey whether his letter contained his opinion "that the most probable primary cause of this mishap was rollback". (J.A. 77). The trial court ruled that Rainey had not been properly qualified to give such an opinion. (J.A. 77-78; V.5: 85-86).

On July 20, 1984 the jury returned a verdict in favor of all Defendants. (J.A. 98-100; R. 1500). On August 1, 1984 the Plaintiffs filed a new trial motion contending that the Court erred in admitting the Jag officer's evaluative conclusions, and in restricting the cross-examination of LCDR John Rainey. (R.1508-1510). The motion was denied. (R.1548).

On appeal, a panel of the Eleventh Circuit reversed as to each of these evidentiary rulings. The panel concluded that it was bound by prior Fifth Circuit precedent, construing Fed.R.Evid. 803(8)(C), which excluded evalu-

ative conclusions contained in public investigative reports, citing *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980).[4] On this authority the panel held that it was error to admit the edited evaluative conclusions contained in Morgan's trustworthy report. *See Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523 (11th Cir. 1986). Judge Johnson concurred in the panel opinion but urged the full Court to accept jurisdiction, *en banc*, to reconsider this interpretation of Rule 803(8)(C). In his concurrence, he characterized *Smith v. Ithaca* as "an anomaly among the circuits", and urged the entire court to adopt the majority rule favoring broad admissibility of evaluative conclusions. *Rainey*, 784 F.2d at 1530.

The panel also reversed because it felt that the Trial Court improperly limited the cross-examination of Commander Rainey. The Panel held that the Rule of Completeness, as codified in Fed.R.Evid. 106, required that Rainey be afforded an opportunity to testify and offer his opinion on causation which was contained in his unsolicited post accident letter to Morgan. The panel also indicated, in a footnote, that Rainey's opinion on causation should have been admitted as a prior consistent statement pursuant to Fed.R.Evid. 801(d)(1)(B). *See* 784 F.2d at 1529.

Each defendant filed a Petition for panel re-hearing and re-hearing *en banc*. On May 27, 1986, the *en banc*

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[4] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions issued prior to September 30, 1981. Such precedent under *Bonner* can only be overruled en banc by a majority of the Eleventh Circuit. *Id.* at 1210-1212.

Court vacated the panel opinion and ordered briefing and rehearing *en banc*. *Rainey v. Beech Aircraft Corp.*, 791 F.2d 833 (11th Cir. 1986). On September 22, 1987 the Court issued its *en banc per curiam* opinion holding that Morgan's investigative report was a trustworthy public record of an investigation conducted pursuant to law. (J.A. 177). The *en banc* Court, however, was divided six-six on the issue of whether evaluative conclusions contained in trustworthy reports are admissible pursuant to Fed.R.Evid. 803(8)(C). *See Rainey v. Beech Aircraft Corp.*, 827 F.2d 1498 (11th Cir. 1987). Because of this division, the Court was constrained to follow the decision of the panel opinion, which excluded the evaluative conclusions. On the second point the *en banc* court agreed with the panel that the trial court had improperly limited the cross-examination of Rainey.

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SUMMARY OF ARGUMENT

The Petitioner, Beech, respectfully argues that the district court properly applied Fed.R.Evid. 803(8)(C) in admitting into evidence trustworthy evaluative conclusions contained in a Jag report prepared pursuant to law. The report was prepared by a duly appointed Naval officer after conducting an extensive investigation into the crash of a Navy Trainer Aircraft.

After deliberation over four months the trial court correctly determined that the phrase "factual findings" as used in the Rule is broad enough to include trustworthy evaluative conclusions drawn by the investigative officer.

This result is supported by the advisory committee note and Senate Report on the Rule, both of which urge the admission of evaluative findings which are contained in trustworthy public records. The position favoring broad admissibility of evaluative findings is the better reasoned approach, and is one which has been approved by every Circuit to consider the issue save the Eleventh.

Once it is determined that a report is a public record of an investigation conducted pursuant to law the court's central inquiry should be the trustworthiness of the findings. Although the Rule provides for admissibility in the first instance, there are additional safeguards to assure the reliability of a report before it is received as evidence. If, after discovery and analysis by the District Court a report is found trustworthy, and it contains findings which are helpful and relevant, they should be submitted for consideration and weighing by the finder of fact.

The Eleventh Circuit also misapplied a fundamental principle of evidence in holding that the trial court abused its discretion by refusing to allow a lay witness to express a hearsay expert opinion on the issue of causation. Plaintiff, John C. Rainey, was called by the defense as an adverse witness and questioned about certain factual admissions contained in an unsolicited post-accident letter which he had written to Jag Officer Morgan. On cross-examination, by his own counsel, Rainey was asked whether his letter also contained his opinion on causation. The trial court sustained an objection to this question, ruling that Rainey had not been properly qualified to render such an opinion.

On appeal, for the first time, a panel of the Eleventh Circuit opined that Rainey should have been allowed to

offer his opinion on causation pursuant to the Rule of Completeness, Fed.R.Evid. 106. This conclusion, we respectfully say, was wrong since Plaintiffs never raised this Rule of Evidence at pretrial, trial or on appeal to support admissibility of Rainey's opinion. The history, language, and purpose of Rule 106 indicate that it is not self-executing. To avoid a waiver a party must invoke the Rule as soon as he believes that a written document is being introduced in a misleading fashion.

In the instant case, Rule 106 appears nowhere in the record as it was never raised by the Plaintiffs. To overturn a two-week trial on a point of evidence which was never presented for the trial court's consideration is fundamentally wrong. Rule 106 is also inapplicable because Rainey's purported expert opinion was inadmissible hearsay. The rule is designed to cover an order of proof problem, it should not be used as a guise to admit otherwise inadmissible testimony.

The Eleventh Circuit also concluded in a footnote that Rainey's statement was admissible as a prior consistent statement. This rule, namely, Fed.R.Evid. 801(d)(1)(B) was misapplied since Rainey had not been impeached or charged with a recent fabrication. In fact, his testimony on direct was entirely consistent with his previous statements. Thus, no predicate existed to support admission of Rainey's hearsay opinion on causation as a prior consistent statement. By this holding the Eleventh Circuit has improperly approved the use of prior consistent statements to bolster a party's general theory of the case.

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ARGUMENT

I

THE TRIAL COURT PROPERLY APPLIED FEDERAL RULE OF EVIDENCE 803(8)(C), IN ADMITTING EVALUATIVE CONCLUSIONS CONTAINED IN A TRUSTWORTHY INVESTIGATIVE REPORT PREPARED PURSUANT TO LAW.

The issue presented for this Court's consideration is whether the phrase "factual findings" as used in Rule 803(8)(C) contemplates the admission of evaluative conclusions derived from reports prepared pursuant to law.

This Rule of Evidence codifies the common law by providing a hearsay exception for trustworthy public reports. *See* Fed.R.Evid. 803(8)(C) advisory committee note. The Rule, when approved, expanded then existing law which had required resort to the less appropriate business records exception where non-federal public agencies were involved.

For a report to be admitted pursuant to Rule 803(8)(C) the court must be satisfied that it is a trustworthy public record of an investigation conducted pursuant to law. In the present case, these preliminary considerations have been resolved by the District Court, the panel, and the *en banc* Court of Appeals all of whom agreed that Morgan's report was a trustworthy public record. *See Rainey v. Beech Aircraft Corporation*, 827 F.2d 1498, 1516 (11th Cir. 1987), Tjoflat J. concurring ("A majority of this court agrees that LCDR Morgan's investigative report is a public record and that it is trustworthy for purposes of Rule 803(8)(C)").[5]

A. Intent of the Drafters

The scope of the phrase "factual findings" as used in Rule 803 has been the source of some debate. Prior to the adoption of the Federal Rules of Evidence the cases were divided on whether evaluative conclusions contained in public reports were admissible. *See* Fed.R.Evid. 803(8)(C) advisory committee note. The drafters of the Rules intended to resolve this split by providing for the admission of evaluative conclusions contained in trustworthy public reports. *Zenith Radio Corp. v. Matsuchita Electric Industrial Company*, 505 F. Supp. 1125, 1145 (E.D. Pa. 1980), *aff'd in relevant part rev'd in part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) ("The advisory committee notes accompanying 803(8)(C) makes clear the intent of the drafters to permit admission of the evaluative report"). In reaching its conclusion in favor of broad admissibility the advisory committee looked for guidance to several federal statutes which create hearsay exceptions for evaluative conclusions contained in public reports. Noting that these statutes authorized the admission of evaluative findings the advisory committee opined:

> While these statutory exceptions to the hearsay rule are left undisturbed, Rule 802, the willingness of Congress to recognize a substantial measure of admissibility for evaluative reports is a helpful guide.

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[5] See *Rainey v. Beech Aircraft*, 827 F.2d 1498 (11th Cir. 1987) ("The sole issue that evenly divides this Court is whether 'factual findings' resulting from an investigation; Fed.R.Evid. 803(8)(C), encompasses evaluative conclusions derived from the report") *Id.* at 1516.

See Fed.R.Evid. 803(8)(C) advisory committee note. As this excerpt demonstrates, the intention of the drafters was to give a broad construction to the phrase "factual findings," and to permit introduction into evidence of evaluative conclusion. *See Ellis v. International Ulaytex Inc.*, 745 F.2d 292, 301 (4th Cir. 1984) (" . . . . it is well established that the phrase should be interpreted broadly). *Baker v. Elcona Homes Corp.*, 588 F.2d 551, 557 (6th Cir. 1978) *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979) ("The advisory committee notes, however, accept evaluative reports as being within the meaning of factual findings under Rule 803(8)(C)"). *See also Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir. 1978). Thus, evaluative conclusions are admissible pursuant to Rule 803(8)(C) as long as the investigative public report contains sufficient indicia of trustworthiness. *See Zenith Radio Corp. v. Matsushita Electric Industrial Company*, 505 F. Supp. 1125, 1145.

Despite the clear intent of the drafters, the House and Senate Judiciary Committees differed as to the proper scope of the Rule. The House Committee felt that the phrase "factual findings" should be strictly construed to exclude evaluative conclusions. *Report of the Committee on the Judiciary* H.R. Rep. No. 93-650, 93rd Congress, 1st Sess. 14 (1973). The Senate Committee took strong exception to this limited understanding of the application of the rule, finding that such an interpretation was contrary to the "intended operation of the rule as explained in the Advisory Committee notes." *Report of the Committee on the Judiciary* S. Rep. No. 93-1277 93rd Congress, 2d Sess. 18 (1974). This conflict was never resolved, as the Conference Committee made no reference to the scope

of Rule 803(8) or to the meaning of the phrase "factual findings." *See Notes of Conference Committee* H.R. Conf. Rep. No. 1597, 93d Cong. 2d Sess. *See also Baker v. Elcona Homes*, 588 F.2d 551, 556-557 (6th Cir. 1978). Although the legislative history concerning the admission of evaluative conclusions in public reports is equivocal, "the Senate's view is more consistent with the other hearsay exceptions and with the general spirit of the Federal Rules of Evidence, and is more easily justified on policy grounds." *Rainey*, 827 F.2d at 1511 (Tjoflat, J. concurring.) *See also United States v. American Telephone & Telegraph*, 498 F. Supp. 353, 359 (D. D.C. 1980) ("Extrinsic materials indicate that the Rule is most appropriately considered by following the Senate Committee's position"). The Senate and Advisory Committee's broad interpretation of Rule 803(8)(C) has been adopted by the overwhelming number of courts. In fact, every Circuit Court of Appeals which has addressed this issue, except the Eleventh Circuit, has sanctioned the admissibility of evaluative conclusions which are contained in trustworthy reports of investigations conducted pursuant to law. *See, e.g.*, Second Circuit; *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 700 F.2d 785, 818 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984); Third Circuit: *Melville*, 584 F.2d at 1316. Fourth Circuit: *Ellis*, 745 F.2d at 300, 301; Fifth Circuit: *McClure v. Mexia Independent School District*, 750 F.2d 396, 399-400 (5th Cir. 1985);[6] Sixth Cir-

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[6] The Fifth Circuit adopted a narrow construction of Rule 803(8)(C) in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980). Counsel notes, however, that the Fifth Circuit has

(Continued on following page)

cuit: *Baker,* 588 F.2d at 557-58; Seventh Circuit: *Baz v. Walters,* 782 F.2d 701, 705 n.2 (7th Cir. 1986); Eighth Circuit: *Kehm v. Proctor & Gamble Manufacturing Co.,* 724 F.2d 613, 618 (8th Cir. 1983); Ninth Circuit: *Plummer v. Western International Hotels Co.,* 656 F.2d 502, 504-505 (9th Cir 1981); Tenth Circuit: *Perrin v. Anderson,* 784 F.2d 1040, 1046-47 (10th Cir. 1986). *See also Chandler v. Roudebush,* 425 U.S. 840, 863, n.39, 96 S.Ct. 1949, 48 L.Ed.2d 416 (1976).[7] The composite result reached, over time, by these courts represents the better reasoned view and is consistent with the intent of the drafters as well as the overall spirit and purpose of the Federal Rules of Evidence. *Rainey,* 827 F.2d at 1511.

B. Considerations of Public Policy

The supporting rationale for Fed.R.Evid. 803(8)(C), as with all hearsay exceptions is that, where sufficient

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(Continued from previous page)

been less than uniform in its application of this rule. *See Mac Towing Inc. v. American Commercial Lines,* 670 F.2d 543, 547 (5th Cir. 1982); *Local Union No. 59, International Brotherhood of Electrical Workers v. Namco Electric, Inc.,* 653 F.2d 143, 145 (5th Cir. 1981); *Garcia v. Gloor,* 618 F.2d 264, 272 (5th Cir. 1980) *cert. denied,* 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981). *See also Rainey,* 827 F.2d 1515, 1516 (Tjoflat, J., concurring). To say the very least, *Ithaca* has a checkered past.

7 In *Chandler,* this Court held that prior administrative findings in an employment discrimination case are admissible, pursuant to Rule 803(8)(C), in a subsequent federal trial on the same claim. The reasoning in *Chandler* was adopted in *Cohen v. General Motors,* 534 F. Supp. 509 (W.D. Mo. 1982), wherein the Court admitted conclusory findings by the National Highway Traffic Safety Administration (NHTSA). In so doing, the District Court rejected the reasoning in *Smith v. Ithaca Corp.,* 612 F.2d 215 (5th Cir. 1980), noting that this Court, in *Chandler,* had "given a broad directive for liberal use of agency findings." *Cohen,* 534 F. Supp. at 512. *See also Baker v. Elcona Homes Corp.,* 588 F.2d 551, 557 (6th Cir. 1978).

guarantees of trustworthiness exist a relevant statement should be admitted for consideration by the trier of fact. *See* Fed.R.Evid. 803(8)(C) advisory committee note. Admissibility of public reports in the first instance is initially supported by the fact that government investigators generally employ well understood methodology, and traditionally conduct their investigations at or near the time of the incident in question. *Rainey,* 827 F.2d at 1512, 1513 (Tjoflat, J. concurring). Thus, the fundamental trustworthiness of a public report arises from the rebuttable presumption that officials will perform their duties properly with no motive other than to inform the public fairly and adequately.[8] *Ellis,* 745 F.2d at 300, and *Kehm,* 724 F.2d at 618. The Rule also performs a practical function as it is unlikely that government investigators will always be available to testify or that they will recall the specifics of an investigation independently of the record. *See* Fed.R.Evid. 803(8)(C) advisory committee note *citing Wong Wing Foo v. McGrath,* 196 F.2d 120 (9th Cir. 1952). *See also* McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations,* 42 Iowa L.Rev. 363 (1957).

The rationale of Rule 803(8)(C) applies whether a report's findings are characterized as historical facts or

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8 The presumption regarding the impartiality and fairness of government investigators is particularly applicable where, as here, the report contains findings unfavorable to officers of the agency conducting the investigation. *Cf. Perrin,* 784 F.2d at 1047 (rejecting argument that an internal investigation resulting in a *favorable* report to an officer of the investigating agency is necessarily biased, absent specific evidence.) Of course, any such motivational problems are matters to be brought to the court's attention during the initial trustworthiness determination. *See* Fed.R.Evid. 803(8)(C), advisory committee note.

evaluative conclusions. The presumption of reliability is simply not dependent on the description or characterization of the findings.

> The rationale for the admissibility of factual findings contained in public records . . . lies in their fundamental trustworthiness. The guarantee of trustworthiness does not necessarily reside in the contents of the records, be they facts or conclusions but rather in their source. "[P]ublic records or reports, by virtue of their being based on legal duty and authority, contain sufficient circumstantial guarantees of trustworthiness to justify their use at trial." Since the reliability of the factual findings results essentially from the fact that the public official concerned is pursuing an investigation authorized by law, there is no reason not to admit findings simply because they tend towards the conclusory rather than the factual end, unless as Rule 803(8)(C) further provides, the "sources of information or other circumstances indicate lack of trustworthiness." [citations and footnotes omitted]

United States v. American Telephone & Telegraph, 498 F. Supp. at 360. As is indicated, the trustworthiness and reliability of an investigative report dictates its admissibility, rather than an artificial distinction between those findings which are conclusionary and those which are factual.

A strong policy basis supports the view that evaluative conclusions contained in public reports should be considered factual findings within the meaning of the Rule. In an era where agency investigations occur with increasing regularity, the Rule provides a needed link between administrative agencies and the judiciary.

> Each year at great cost to the public, administrative agencies conduct numerous investigations that produce evaluative reports, most of which are reliable. These reports doubtless contain information and conclusions of considerable probative value in private litigation. The drafters of rule 803(8)(C) created a hearsay exception to take advantage of this public resource.

The Trustworthiness of Government Evaluative Reports Under Federal Rule of Evidence 803(8)(C), 96 Harvard Law Review 492 (1982). This note posits the question whether restrictive interpretations of Rule 803(8)(C) may severely undermine the important interrelationship between the judicial and administrative branches. If trustworthy administrative findings are to be shielded from the fact finder simply because they contain evaluative conclusions, the end result will be a significant impediment in the ultimate search for truth.

Admission of trustworthy evaluative conclusions pursuant to Rule 803(8)(C) also releases trial courts from the difficult, and often arbitrary decision, of distinguishing between those findings which are evaluative and those findings which are factual. *See Miller v. New York Produce Exchange*, 550 F.2d 762, 769 (2d Cir. 1977) *cert. denied*, 434 U.S. 823, 98 S.Ct. 68, 54 L.Ed.2d 80 (1977); *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523 (11th Cir. 1986) (Johnson, J., concurring). ("Broad admissibility releases trial judges from the duty to draw sometimes arbitrary lines between fact and opinion, and focuses the Court's inquiry instead on the trustworthiness and relevance of the reports in question"). Relieving trial courts of the burden of drawing hair-splitting fact/opinion distinctions would also prevent the creation of a new series of

endless appeals by litigants seeking to challenge the trial court's determination. *See* 4 J. Weinstein and M. Berger *Weinstein's Evidence* 803(8) [03] (" . . . a clear cut distinction between fact and opinion is impossible to draw").

Admissibility of public reports is also supported by the fact that governmental investigations are often difficult, if not impossible, to replicate. Often, a litigant will have access to neither the resources nor expertise necessary to duplicate a government investigation. *See, e.g., Kehm v. Proctor & Gamble Mfg. Co.*, 724 F.2d 613 (8th Cir. 1983) (Epidemiological studios by center for disease control on statistical incidence of toxic shock syndrome). Lastly, Government investigators often enter the picture at or near the time of a particular event and have access to eyewitnesses' accounts and other information which may not be available at a later date. *See Sage v. Rockwell International Corporation*, 477 F. Supp. 1205, 1210 (D. N.H. 1979). To exclude these reports simply because they contain evaluative conclusions may deprive the fact finder from access to evidence which is not otherwise available.

C. Trustworthiness and Safeguards

Although weighted in favor of admissibility, Rule 803(8)(C) does not authorize the unregulated admission of all governmental investigative reports. Prior to admission, the Court must be satisfied that the report is relevant and that its findings are *trustworthy*. *See Kehm*, 724 F.2d 613, 618 (" . . . . once a report is conclusively shown to represent findings of a public agency made pursuant to an investigation authorized by law, the central inquiry becomes whether the report is trustworthy"). Thus, although the rule provides for admissibility in the first instance it also

contains "ample provision for escape if sufficient negative factors are present." Fed.R.Evid. 803(8)(C) advisory note.

That trustworthiness is critical to the Court's analysis is indicated by the text of the rule itself, which sanctions the admission of government reports, "unless the sources of information or other circumstances indicate lack of trustworthiness." *See* Fed.R.Evid. 803(8)(C). Reliability is also the central focus of the advisory committee note which suggests several factors for determining trustworthiness:

> (1) the timeliness of the investigation;
>
> (2) the special skill or experience of the official;
>
> (3) whether a hearing was held and the level at which it was conducted; and
>
> (4) possible motivational problems involved with the preparation of the report. (citations omitted)

Fed.R.Evid. 803(8)(C) advisory committee note. This listing is, of course, only illustrative and non-exclusive, leaving the courts free to consider other factors which may bear on the trustworthiness of a particular report. *See Zenith Radio Corp.*, 505 F. Supp. 1125, 1147 (listing seven additional factors which the court considered in determining the trustworthiness of a public report).[9]

Through discovery, counsel can scrutinize the means and methodology employed in an investigation as well as

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[9] The advisory committee note to 803(8)(C) in providing a non-exclusive list of factors affecting trustworthiness specifically advises that, "others no doubt could be added." Fed.R.Evid. 803(8)(C) advisory committee note.

the qualifications of the investigator. After reviewing the evidence, the trial court can determine which, if any, portions of a public report are admissible. *See Perrin,* 784 F.2d at 1047; *Miller,* 550 F.2d at 769. *See also Franklin v. Skelly Oil Co.,* 141 F.2d 568, 572 (10th Cir. 1944) ("the trial court is the first and best judge of whether tendered evidence meets that standard of trustworthiness and reliability which will entitle it to stand as evidence of an issuable fact, absent the test of cross-examination"). The exclusionary provision of Rule 803(8)(C) itself, therefore, provides a sufficient safeguard against the admission of unreliable evidence. *Melville,* 584 F.2d at 1316.

Other Federal Rules of Evidence provide additional check points through which the trustworthiness issue must pass. Initially, any finding can be tested by the relevancy requirements of Fed.R.Evid. 401 and 402. If found relevant, evidence may nevertheless be excluded on the grounds of prejudice, confusion or waste of time. See Fed.R.Evid. 403. Additionally, since public evaluative reports are now generally prepared by experts, Rule 803(8)(C) can be interpreted in conjunction with Rule 702, which permits objections to the qualifications of an expert, and Rule 705, which allows disclosure on cross-examination of facts underlying an expert's testimony. *See Melville,* 584 F.2d at 1316.[10]

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10 Invocation of Rules 702 and 705, however, would not be warranted until a sufficient showing of untrustworthiness has been established. *See Melville,* 584 F.2d at 1316 ("Before these objections may be recognized, however, the party challenging the validity of an official report admitted under 803(8)(C) must come forward with some evidence which would impugn its trustworthiness.")

Beyond the safeguards provided in the rules, a party against whom a report is offered may always attack the weight and credibility of the findings before the jury. As one court has noted, "[a]lthough Rule 803(8) requires the court to make a threshold determination on the trustworthiness, the Rule also clearly implies that where the court determines that the evidence passes that threshold, the party against whom the evidence is offered may counter it by introducing before the jury evidence of the trustworthiness of the public record or report." *Zenith Radio Corp.,* 505 F. Supp. at 1146. *See United States v. School District of Ferndale,* 577 F.2d 1339, 1355 (6th Cir. 1978) (circumstances that do not clearly indicate lack of trustworthiness may affect weight given the findings). This procedure permits admission without sacrificing scrutiny. *Ellis,* 745 F.2d at 303.

Finally, the authority of the trial court to give a cautionary instruction provides an umbrella safeguard against any potential prejudice which may arise from the admission of a public report. *See Zenith Radio Corp.,* 505 F. Supp. at 1146 n.15. Such an instruction may focus on the weight to be given the report's findings or a warning to the jury regarding substituting an official's judgment for their own. *See* 4 J. Weinstein and M. Berger, *Weinstein's Evidence* § 803(8) [03] (1985).

In the present case, the Respondents made no attempt to attack the reliability of the Jag report or the qualifications of LCDR Morgan. *See Rainey,* 827 F.2d at 1508. ("Although the plaintiffs knew months before trial that the defendants would seek to admit LCDR Morgan's investigative report into evidence, they attacked neither the qualifi-

cations of LCDR Morgan nor the methodology he employed''). At the July 10, 1984 pretrial conference the Court granted plaintiff's request to submit evidence regarding the trustworthiness of the Jag report.[11] The trial court also indicated that it would consider any cautionary instructions submitted by the Plaintiffs. (J.A. 42). Despite this invitation the Respondents-Plaintiffs failed to submit any evidence to impugn the trustworthiness of the report or the qualifications of LCDR Morgan. As a result the trial and appellate courts correctly concluded that the Jag report was trustworthy for purposes of Rule 803 (8)(C). *Rainey*, 827 F.2d at 1508 ("The Plaintiffs have not met their burden. For these reasons this court cannot, and does not, set aside the district court's finding that the report is trustworthy").[12]

D. Consideration by the Finder of Fact

With trustworthiness firmly established, Respondents are forced to argue that the evaluative conclusions in trustworthy public reports are *per se* inadmissible. Although this position is at variance with the stated purpose of Rule 803(8)(C), Respondents urge that the Jag report went to an ultimate issue and, thus, invaded the province of the jury. This contention, however, is nothing more than

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11 The defendants stipulated that they would have no objection to plaintiff's calling unlisted witnesses for this purpose. (J.A. 41-42).

12 Plaintiffs did present expert opinion evidence at trial which was clearly at odds with the findings in the Jag report. Thus, the jury was fully aware of the parties' conflicting assessments of the validity of the findings in the Jag report and was fully capable of evaluating the evidence on both sides. *See Kehm*, 724 F.2d at 619.

a veiled attempt to resurrect the long dead "ultimate issue" rule. This common law rule was expressly abolished by Federal Rule of Evidence 704, which provides:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionale because it embraces an ultimate issue to be decided by the trier of fact.

Fed.R.Evid. 704[13] The basis typically asserted in favor of the common law rule, namely to prevent the witness from "usurping the province of the jury is aptly characterized as 'empty rhetoric'." Fed.R.Evid. 704 advisory committee note, 7 Wigmore on *Evidence* § 1920 (1940), *United States v. Morgan*, 554 F.2d 31, 33 (2d Cir. 1977), *cert. denied*, 434 U.S. 965, 98 S.Ct. 504, 54 L.Ed.2d 450 (1977). Of course, not every opinion which embraces an ultimate issue is automatically admissible. As with all opinions, one going to an ultimate issue should only be allowed when the court determines that its admission would be helpful to the trier of fact. *See* Fed.R.Evid. 702, *Rainey*, 827 F.2d at 1512.

In this case admission of the Jag officer's findings could only serve to aid the jury in its duties. The tragic death of both pilots, together with the almost total destruction of their aircraft made expert testimony critical. In fact, at trial each party relied heavily on expert testimony in an effort to prove their respective cases. *See Rainey*, 827 F.2d at 1507. Many of these experts gave direct testi-

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13 The ultimate issue Rule was abolished by the Federal Rules of Evidence because the advisory committee concluded that it was premised on an unworkable fact/law distinction. *See* 4 J. Weinstein & M. Berger *Weinstein's Evidence*, § 803 (8) [03] (1985).

mony on the issue of ultimate liability. Given this fact, there is no justification for excluding the findings of LCDR Morgan, the only impartial expert, and the only individuals to investigate this crash immediately following its occurrence.[14]

If the goal of the Federal Rules of Evidence is to insure, "that the truth may be ascertained and proceedings justly determined," then there is no logical reason for excluding evaluative conclusions which are trustworthy. *See* Fed.R.Evid. 102. Often these evaluative conclusions are highly probative and provide the only unbiased expert findings on a particular issue. Thus, if these findings are trustworthy they should be submitted for consideration and weighing by the finder of fact.

> Rule 803(8) should be interpreted in accord with th[e] treatment of 'opinion' evidence. If the report states a conclusion that would be helpful—and is reliable—it should be admitted.

Rainey, 827 F.2d at 1515. (Tjoflat, J., concurring) (quoting from 4 J. Weinstein and M. Berger *Weinstein's Evidence*, 803(8) [03] (1985). To arbitrarily exclude trustworthy relevant findings simply because they tend towards the conclusory is an unwarranted restriction on the trier of fact. On balance, juries in this country have long been considered capable of making fine distinctions and according appropriate weight to particular pieces of evidence. This Court, on occasion, has taught that the jury's function will not be impaired by consideration of a government re-

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[14] The Mishap Board officers could not give evidence nor could their Report be obtained or used.

port. In *Meeker v. Lehigh Valley Railroad Company*, 236 U.S. 412, 35 S.Ct. 328, 59 L.Ed 644 (1915), the Court upheld the admission of findings and orders of the Interstate Commerce Commission. In rejecting the contention that admission of the report infringed upon the right to a trial by jury, this Court stated:

> This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents.

Id. at 430, 35 S.Ct. at 335. *See also In the Matter of Peterson*, 253 U.S. 300, 310, 40 S.Ct. 543, 64 L.Ed. 919 (1920).[15] Likewise, here any party was free to introduce evidence and to call any witnesses, including Jag Officer Morgan, to attack or support the report and its findings. *See Mac Towing, Inc. v. American Commercial Lines*, 670 F.2d 543, 547 (5th Cir. 1982) (court properly admitted report of Marine accident but was free to give document whatever weight it deserved). In the instant case the system worked as intended. Respondents are simply dissatisfied because they inexplicably failed to present any evidence attacking either the qualifications of Jag Officer Morgan, the methodology which he employed, or the results of his investigation.

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[15] This conclusion is all the more appropriate in the instant case, because the findings in the Jag report created no presumption, but were instead to be considered together with all the other evidence presented.

E. Plain Language of the Rule

The use of the phrase "factual finding" in Rule 803(8)(C) further militates against a restrictive interpretation. A *finding* is defined by Black's as, "[a] decision upon a question of fact reached as a result of a judicial examination or investigation by a court, jury, referee, coroner, etc."[16] Black's defines a *finding of fact* as "[A] conclusion by way of reasonable inference from the evidence." Black's Law Dictionary 569 (5th ed. 1979) *See also Griffith v. Gardner,* 196 F.2d 698, 701 (9th Cir. 1952). Thus, the phrase *factual findings* by its plain meaning is broad enough to include investigative conclusions derived from an examination of the facts without exercise of legal judgment. *See Rainey,* 827 F.2d at 1510, and *Zenith Radio Corp.,* 505 F. Supp. 1144 (". . . . the term is broad enough to encompass any statement of fact that represents a conclusion on the part of an investigator . . ."). Therefore, by its commonly understood meaning, factual finding includes investigative conclusions derived from an examination of the facts. *Rainey,* 827 F.2d at 1510 (Tjoflat, J. concurring).

This interpretation of the phrase factual findings comports with vase majority of cases, which have admitted evaluative conclusions derived from investigative facts. By way of example, courts have determined that the following investigative conclusions qualify as "factual findings" pursuant to Rule 803(8)(C): conclusion of Coast

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16 Ballentine's Law Dictionary defines finding of fact as, "[A] conclusion drawn . . . . from the facts without exercise of legal judgment." Ballantine's Law Dictionary 474 (3d ed. 1979).

Guard hearing examiner regarding responsibility for an assault. *See Lloyd v. American Export Lines, Inc.,* 580 F.2d 1179 (3d Cir. 1978), *cert. denied,* 439 U.S. 969, 99 S.Ct. 461, 58 L.Ed.2d 428 (1978); administrative law judge's finding that Captain acted reasonably in mooring vessel. *See Complaint of Paducah Towing Co.,* 692 F.2d 412, 421 (6th Cir. 1982); conclusion in internal police report that officer acted contrary to department policy in handcuffing suspect with his weapon cocked; *Wilson v. Beebe,* 770 F.2d 578, 590 (6th Cir. 1985); HEW finding that school had been established and maintained for segregatory purposes, *United States v. School District of Ferndale,* 577 F.2d 1339, 1354 (6th Cir. 1978); police officer's conclusion that particular vehicle ran a red light, *See Baker v. Elcona Homes Corp.,* 588 F.2d 551, 556 (6th Cir. 1978), *cert. denied,* 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979); determination that phone company's rates were unreasonable and discriminatory. *See Litton Systems, Inc. v. ATdT,* 700 F.2d 785, 818-819 (2d Cir. 1983), *cert. denied,* 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984).

Consistent with these decisions, the trial court herein admitted Morgan's finding that "the most probable cause of the accident was the pilot's failure to maintain proper interval." This evaluative conclusion had been derived from a specific factual finding which had also been incorporated in Morgan's report (Finding of fact #13, "At approximately 1020, while turning crosswind without proper interval, 3E955 crashed, immediately caught fire and burned") (J.A. 10). Thus, Morgan's finding was simply an evaluative conclusion, which he had derived after conducting an extensive factual inquiry. This report, however, did not reach a legal conclusion, make a finding of negligence

or attempt to attribute ultimate fault. We respectfully suggest that Morgan's evaluative conclusion is the type of trustworthy finding contemplated by Rule 803(8)(C), and was properly admitted.

II

FEDERAL RULE OF EVIDENCE 106 WAS NEVER INVOKED BY THE PLAINTIFFS AND IS WHOLLY INAPPLICABLE TO THE TESTIMONY OF LCDR RAINEY.

Plaintiff, LCDR John C. Rainey, was called by the defense as an adverse party witness.[17] During direct, Rainey was questioned about statements contained in an unsolicited letter which he had written. The letter was written after he had conducted his own informal investigation into the circumstances surrounding the accident. Rainey sent this letter to LCDR William C. Morgan, the Jag officer appointed to investigate this air crash.

On direct Rainey was questioned about factual admissions contained in his letter. (J.A. 53-75). These questions were limited to objective facts involving unnecessary pressure on the pilots, and the final flight maneuvers of the downed aircraft. (J.A. 53-75). As one would expect LCDR Rainey was never asked his opinion as to the legal cause of this tragic accident.

The Rainey letter was not admitted as evidence, in whole or in part, nor did counsel attempt to read its contents to the jury. (J.A. 53-78).

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17 Rainey was not called as a witness by the Plaintiffs, either in their case in chief or in rebuttal.

On cross examination by his counsel, LCDR Rainey explained that he had not attempted to influence the testimony of any witnesses. (J.A. 76). He also testified that shortly after this accident, he and Commander Shields had duplicated the final flight maneuvers of his wife's aircraft, and in their experience the plane would not stall with full power available. (J.A. 76-77). The trial court refused, however, to allow Plaintiff's counsel to ask Rainey whether his letter also contained his opinion that, "the most probable primary cause of this mishap was rollback." (J.A. 77). The basis for the trial court's ruling was that Rainey had not been qualified to render an expert opinion on the fuel flow mechanics of a PT 6-A25 engine. Thereafter, Plaintiffs' counsel made no attempt to qualify Rainey as an expert, proffer his testimony, call him as a rebuttal witness or otherwise seek admission of the disputed letter.

The panel of the Eleventh Circuit concluded that the trial court's failure to permit Rainey's hearsay opinion on causation violated the Rule of Completeness embodied in Fed.R.Evid. 106. The panel believed that introduction of Rainey's factual admissions without his opinion on causation created a misleading impression of his position as to the cause of this accident. *See Rainey*, 784 F.2d at 1529, 1530.[18] For the reasons which follow, the court's invocation of Fed.R.Evid. 106 was, we respectfully say, incorrect and a clear departure from the accepted and usual course of judicial proceedings.

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18 The *en banc* Eleventh Circuit agreed with this conclusion by the panel. *Rainey*, 827 at 1500.

A.

Plaintiffs Have Waived Application of Federal Rule of Evidence 106 by Failing to Invoke it at Trial.

Federal Rule of Evidence 106 has no application to this case because it was never invoked by the Plaintiffs. *United States v. Soulard*, 730 F.2d 1292 (9th Cir. 1984). Defense counsel's proposed use of the Rainey letter was well known prior to trial and was the subject of extended discussion. (J.A. 43-48). In fact, Plaintiffs filed a motion in limine to preclude the defense from utilizing the factual admissions contained in Rainey's letter. (J.A. 43; R. 1308). Notwithstanding these discussions, Plaintiffs never raised Fed.R.Evid. 106, nor advised the trial judge of their belief that it would be necessary to introduce Rainey's hearsay opinion on causation in order to place his prior statements in context. This position of silence continued at trial, as Plaintiffs never mentioned Rule 106 during either the direct or cross examination of LCDR Rainey. Moreover, the Plaintiffs did not raise, argue or brief the applicability of Rule 106 on appeal. Thus, as the record affirmatively demonstrates, at no time during these proceedings did Plaintiffs invoke Rule 106 to support admission of Rainey's hearsay opinion.[19]

The plain wording of Fed.R.Evid. 106 indicates that it is not self-executing:

> When a writing or recorded statement or part thereof is introduced by a party, an *adverse party* may require him, *at that time* to introduce any other part or any other writing . . . which ought in fairness to be considered *contemporaneously* with it. (emphasis supplied)

[19] The first time the applicability of Fed.R.Evid. 106 was raised was in the panel opinion of the Eleventh Circuit Court of Appeals. *See Rainey*, 784 F.2d 1529.

According to its facial terms, a party must invoke 106 to gain the protection which it affords. 21 C. Wright & K. Graham *Federal Practice & Procedure* § 5075 ("Like other evidence rules, the completeness doctrine does not automatically apply; it must be invoked by a party"). The invocation of the Rule should be specific, timely, and appear of record, and be made at the time when a writing or part thereof was first used for an allegedly misleading purpose. 21 C. Wright & K. Graham *Federal Practice & Procedure* § 5076 (". . . the request for completeness should be timely even if made after introduction, so long as it was first made when the writing was first utilized for the apparently misleading purpose"). A failure to invoke the protection of Rule 106 waives its application. *United States v. Soulard*, 730 F.2d 1292 (9th Cir. 1984); *Hill v. Nelson*, 676 F.2d 1371 (11th Cir. 1982).

The mission of the Rule is to regulate order of proof by allowing a party to obtain introduction of a document out of turn. 1 J. Weinstein and M. Berger *Weinstein's Evidence* § 106 [01] (1985). If, however, a party fails to move for introduction of an entire document, when one's opponent introduces a part thereof, he will be deemed to have waived application of Fed.R.Evid. 106. *See United States v. Soulard*, 730 F.2d at 1301 (failure to timely object to evidence as being incomplete will result in a waiver of the Rule's application).

In *United States v. Larranaga*, the court refused a party's request to introduce an entire document on re-

direct, where he had failed to invoke Rule 106 when his opponent utilized a portion of the same document during cross examination. In concluding that application of Rule 106 had been waived, the court stated:

> On appeal, the defendant argues that the transcript was admissible under Federal Rule of Evidence 106. This rule provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Fed.R.Evid. 106. Defendant did not follow the procedure outlined in Rule 106 "at that time" when the questions and answer were introduced. Thus, defendant's reliance on Rule 106 is misplaced.

United States v. Larranaga, 787 F.2d 489, 500 (10th Cir. 1986). As this case illustrates, application of Rule 106 is waived unless a party requires his opponent to introduce all relevant portions of a document at the same time.

Having waived application of Rule 106, a party may, of course, attempt to admit other portions of a disputed document. *See* Fed.R.Evid. 106 advisory committee note. At that point, however, the rule of completeness cannot be invoked as a basis for admitting such evidence. This reasoning is expressed by Professors Wright and Graham, who suggest:

> The failure to make a timely request for completeness may prevent the party from predicating error on the failure to enforce Rule 106; it does not, however, bar the party from introducing the explanatory material himself, assuming that the material is admissible at his behest. (emphasis supplied)

21 C. Wright & K. Graham, *Federal Practice & Procedure* § 5076 (1977). In the present case, Plaintiffs made no attempt during the direct examination of Rainey, to invoke Fed.R.Evid. 106. Instead, Plaintiffs opted to wait until cross examination to attempt to introduce Rainey's hearsay opinion on causation. At that point, however, it was incumbent upon the Plaintiffs to demonstrate the admissibility of those statements without reference to Rule 106. At trial, Plaintiffs were simply unable, or by choice unwilling, to present any justification for the admission of a hearsay expert opinion by a lay witness.

While acknowledging technical non-compliance with the terms of Rule 106, Plaintiffs have asserted that they satisfied the spirit of the Rule by attempting to place Rainey's statement in context during cross examination.[20] The actual question and objection involved, however, must be viewed from the perspective of the trial court—since it was the one required to determine its propriety. As the record plainly shows, Plaintiff's counsel simply asked Rainey whether his letter contained an opinion on causation. An objection was made because Rainey had not been qualified to render an opinion on whether the aircraft's free spool turbine engine experienced a pneumatically induced fuel flow malfunction. On this basis the objection was sustained. (J.A. 78). (". . . that doesn't mean you can qualify him for the question you are now asking. The objection is sustained.") (J.A. 77-78). At this point, Plaintiffs' counsel did not attempt to belatedly invoke Fed.R.Evid. 106, nor did he explain to the court that the

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20 See Plaintiffs' Eleventh Circuit *En Banc* reply brief at p. 18.

question was needed for purposes of completeness. If counsel felt it was justified, he should have explained that Rainey's hearsay opinion was not being offered substantively, i.e., to prove the truth of the matter asserted, but was rather being offered only to explain that portion of the letter which he believed had already been offered. Had this been done, the court's ruling may well have been different. In the context of the actual events at trial, however, the court was correct in excluding Plaintiffs' attempt to introduce an unqualified expert opinion through a lay witness. *See Randolph v. Collectramatic, Inc.*, 590 F.2d 844 (10th Cir. 1979) and *Mitroff v. Xomox Corporation*, 797 F.2d 271 (6th Cir. 1986).

However experienced, trial courts do not have crystal balls, and cannot, in the midst of complex litigation discern counsels' unarticulated intentions. For this very reason Federal Rule of Evidence 103 requires an offer of proof following any ruling excluding evidence. Such an offer serves to place specific matters in context and allows the court to view the scope and effect of its ruling.

The trial court's action in excluding Rainey's hearsay opinion simply cannot be properly characterized as an abuse of discretion. *See O'Donnell v. Georgia Osteopathic Hospital, Inc.*, 748 F.2d 1543 (11th Cir. 1984); *Hoover v. Thompson*, 787 F.2d 449 (8th Cir. 1986). To hold otherwise would be completely unfair, and would force trial judges to speculate as to why a particular piece of evidence is being offered prior to making a ruling on its admissibility.

B.

Federal Rule of Evidence 106 is Designed to Govern Order of Proof, it does not Admit Otherwise Inadmissible Evidence.

Federal Rule of Evidence 106 codifies the rule of completeness. *United States v. Costner*, 684 F.2d 370, 373 (6th Cir. 1982). This rule permits a party, when an opponent introduces a document, to have any explanatory portions of the same document introduced at that time. *See* 1 J. Weinstein and M. Berger *Weinstein's Evidence* § 106 [01] (1985). The rule, however, is limited to regulating offer of proof, and cannot be used as a guise to admit otherwise inadmissible evidence. *United States v. Costner*, 684 F.2d 370 (6th Cir. 1982); *United States v. Terry*, 702 F.2d 299 (2d Cir. 1983) *cert. denied*, 461 U.S. 931, 103 S.Ct. 2095, 77 L.Ed.2d 304 (1983); 1 J. Weinstein and M. Berger *Weinstein's Evidence* § 106 [01] (1985); S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* § 49 (3d ed. 1985). As the *Costner* court stated:

> The rule covers an order of proof problem, it is not designed to make something admissible that should be excluded. (citations omitted)

684 F.2d at 373. A party simply may not utilize this rule to admit through the back door evidence which would be excluded at the front. *See United States v. Terry*, 702 F.2d at 314 ("... in any event Rule 106 does not render admissible evidence which is otherwise inadmissible").[21]

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[21] Counsel notes that a conflict does appear to exist as to whether Rule 106 can be utilized to admit otherwise inadmissible evidence. *See United States v. Sutton*, 801 F.2d 1346 (D.C. Cir. 1986).

The Rainey letter was hearsay, and was thus never offered nor admitted as evidence. *See* Fed.R.Evid. 801(c), 802. The defense utilized Rainey's letter on direct examination to exact oral admissions pursuant to Rule 801(d)(2)(A). The Plaintiffs, however, offered no corresponding exception to the hearsay rule to support admission of Rainey's self-serving opinion as to probable cause. Therefore, the Plaintiffs on appeal should be precluded from relying on Fed.R.Evid. 106 to support admission of this opinion. *United States v. Costner,* 684 F.2d at 373; *United States v. Terry,* 702 F.2d at 314.

C.

The Testimony Which Plaintiffs' Counsel Sought to Elicit on Cross Examination Was Not Offered to Explain or Qualify Rainey's Testimony on Direct and Was Therefore Inadmissible.

Federal Rule of Evidence 106 is applicable only when the portions of the document sought to be admitted are necessary to explain or qualify those portions already introduced. *United States v. Walker,* 652 F.2d 708 (7th Cir. 1981); *United States v. Soures,* 736 F.2d 87 (3d Cir. 1984) *cert. denied,* 469 U.S. 1161, 105 S.Ct. 914, 83 L.Ed.2d 927 (1985). Rainey's direct testimony was limited to facts concerning the pilot's state of mind, pressures, and the final flight maneuvers of the aircraft. (J.A. 53-75). At no time was Rainey asked if he had developed an opinion on causation. The answer which Rainey's counsel sought to elicit on cross was beyond the scope of his direct examination and did not tend to explain or qualify Rainey's previous testimony. Instead, Plaintiffs' counsel was simply attempting to elicit from Rainey an opinion which was consistent with his general theory of the case. The admissibility of such testimony cannot be supported by Fed.R. Evid. 106.

In *United States v. Greene,* 497 F.2d 1068 (7th Cir. 1974) *cert. denied,* 420 U.S. 909, 95 S.Ct. 829, 42 L.Ed.2d 839 (1975), the court refused to admit statements in a letter which were not offered to explain portions already in evidence. In so doing, the court stated:

> On cross-examination, Mrs. Estopinal admitted making the statement in a letter (written after Greene's arrest) that her son was a "happy-go-lucky" type. On re-direct, defense counsel did not ask Mrs. Estopinal to explain what she meant by that statement. Rather, defense counsel asked the witness what else she wrote in this letter without offering the letter into evidence. Defendant contends that the trial court's refusal to permit these questions on redirect violated the doctrine of completeness. Defendant's reliance on the evidentiary rule of completeness is misplaced since the doctrine applies to documents partially admitted into evidence. Here the letter itself was not evidence. In seeking to elicit statements previously made in a document without introduction of the document itself, the defense was actually attempting to introduce a prior consistent statement. . . . Here, any prior consistent statements in Mrs. Estopinal's letter were made *after* a motive to falsify arose. (emphasis in the original, citations omitted)

United States v. Greene, 497 F.2d at 1082. Similarly, in our case, the Rainey letter was never introduced and counsel's question was simply designed to elicit from Rainey a response which he was not properly qualified to give. This opinion testimony was not offered to explain the mental state of the pilots or the final flight maneuvers of the aircraft and was therefore not admissible pursuant to Fed.R.Evid. 106. *See United States v. Marin,* 669 F.2d

73, 84 (2d Cir. 1982) ("completeness doctrine does not, however, require introduction of portions of statement that are neither explanatory of nor relevant to the admitted portions").

III

THE ELEVENTH CIRCUIT MISCHARACTERIZED THE DIRECT EXAMINATION OF COMMANDER RAINEY AND MISCONSTRUED FED.R.EVID. 801(d)(1)(B).

The Eleventh Circuit incorrectly concluded that the defense had utilized the Rainey letter as a prior inconsistent statement pursuant to Rule 801(d)(1)(A). *See Rainey*, 784 F.2d at 1529 (footnote 12) With this false premise as its foundation the Court erroneously found that the Rainey letter should have been admitted as a prior consistent statement. *See* Fed.R.Evid. 801(d)(1)(B). These rules of evidence, however, have no application to the present case, as Rainey's letter was used solely pursuant to Fed.R.Evid. 801(d)(2)(A), as an admission by a party opponent.

Rule 801(d)(1)(A) allows admission of prior inconsistent statements under certain specified conditions. The rule provides in pertinent part:

> . . . (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) *inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury* at a trial, hearing or other proceeding. . . . (emphasis supplied)

Fed.R.Evid. 801(d)(1)(A). This rule of evidence is inapplicable because Rainey had not previously testified;

had uttered no inconsistent testimony on direct; and had not signed the disputed letter under oath. Rainey's testimony on direct was wholly unrelated to this rule.

Having erroneously determined that Rainey was being impeached by a prior inconsistent statement, the Panel concluded that his opinion as to probable cause should have been admitted as a prior consistent statement. Fed. R.Evid. 801(d)(1)(B). This rule provides for admission of a statement if it is:

> (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. . . .

The clear import of this rule indicates that it has no applicability to the testimony of Rainey.

The use of prior consistent statements is only available to rehabilitate witnesses charged with recent fabrications or improper motives. *Hill v. Nelson*, 676 F.2d 1371 (11th Cir. 1982). In this regard the rule is designed to provide a witness with an opportunity to rebut charges of recent fabrication by demonstrating that an earlier statement is consistent with his testimony at trial. 4 J. Weinstein and M. Berger, *Weinstein's Evidence* § 801(d)(1)(B) [01] (1985). In this manner a witness can support the veracity of testimony which has been attacked.

This rule has no application in the present case since Rainey's testimony was entirely consistent with his previous statements. Rule 801(d)(1)(B) only permits the use of prior consistent statements to rehabilitate a witness who has been impeached. *United States v. Weil*, 561 F.2d 1109 (4th Cir. 1977); *United States v. Dennis*, 625 F.2d 782 (8th

Cir. 1980); 4 J. Weinstein and M. Berger, *Weinstein's Evidence* § 801(d)(1)(B) [01] ("Rule 801(d)(1)(B) should apply only when there is some suggestion . . . . that the witness consciously altered his testimony after making the inconsistent statement by which he has been impeached") *Coltrane v. United States*, 418 F.2d 1131 (D.C. Cir. 1969). ("Prior statements . . . are admitted . . . only in those exceptional situations where, as experience has taught, they could be of clear help to the factfinder in determining whether the witness is truthful . . .") In the present case Rainey was never impeached nor charged with a recent fabrication or improper motive. In fact, Rainey affirmed that he had made the factual admissions contained in his letter, and that he believed them to be true. (V.5:60-83). Thus, his trial testimony was entirely *consistent* with his previous statements. Such a scenario offers no predicate for the admission of Plaintiffs' hearsay opinion under the guise of a prior consistent statement.

The Panel's conclusion, to the contrary, improperly approves the use of prior consistent self-serving statements to bolster a party's general theory of the case. *See* 4. J. Weinstein and M. Berger, *Weinstein's Evidence* § 801 (d)(1)(B) [01] (1985). This procedure is improper, as such statements have absolutely no probative value unless they are used to support the veracity of an impeached witness's testimony. *See United States v. McPartlin*, 595 F.2d 1321 (7th Cir. 1979) *cert. denied*, 434 U.S. 965, 98 S.Ct. 504, 54 L.Ed.2d 450 (1979) and 4 J. Weinstein and M. Berger, *Weinstein's Evidence* § 801(d)(1)(B) [01] (1985).

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CONCLUSION

For its part Petitioner Beech does not seek unlimited or unrestrained use of all reports prepared by or at the behest of the Government. This for the ample reason that the latitude for mischief is too wide and the opportunity for wrong too great. Rather, we seek to use portions of reports and records which not only carry the imprimatur of law but which are demonstrably trustworthy on the record and in the eyes of the Court. Moreover, use of reports should be carefully policed by the trial court to secure to the opponent of the report every safeguard against institutional bias, unreliable evidence or the like.

With regard to the issue of Completeness and the use of prior Consistent Statements, we say in the most respectful terms, that the Court of Appeals' perception and description of Rainey's trial appearance is wrong.

For these reasons, the Court of Appeals should be reversed and directed to order the reinstatement of the District Court's judgment(s).

Respectfully submitted,

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